BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Southern California Edison Company (E 3338-E) for Authority to Institute a Rate Stabilization Plan with a Rate Increase and End of Rate Freeze Tariffs.	Application 00-11-038 (November 16, 2000)
Emergency Application of Pacific Gas and Electric Company to Adopt a Rate Stabilization Plan (U 39 E).	Application 00-11-056 (Filed November 22, 2000)
Petition of THE UTILITY REFORM NETWORK for Modification of Resolution E-3527.	Application 00-10-028 (Filed October 17, 2000)

ORDER DENYING REHEARING OF DECISION (D.) 05-01-036

In Decision (D.) 04-12-014, we adopted a permanent methodology for allocating the Department of Water Resources' ("DWR") annual revenue requirement determination between Pacific Gas and Electric Company ("PG&E"), Southern California Edison Company ("Edison") and San Diego Gas & Electric Company ("SDG&E"). SDG&E had filed a timely application for rehearing of D.04-12-014. On January 13, 2005, we disposed of SDG&E's rehearing application in D.05-01-036. In that decision, we determined that the allocation methodology adopted in D.04-12-014 contained legal error with respect to the above-market costs. Therefore, we granted limited rehearing to permit the parties to propose and develop a record as to how the above-market costs should be determined. (D.05-01-036, p. 6 [Ordering Paragraph No. 1].)

On January 24, 2005, PG&E and The Utility Reform Network (jointly, "PG&E/TURN") filed an application for rehearing of D.05-01-036. PG&E/TURN

contend that D.05-01-036 is void because it was not issued within the 20-day timeframe specified under Public Utilities Code section 1731(c).[1] On February 1, 2005, SDG&E filed a response opposing PG&E/TURN's rehearing application.

We have carefully considered each and every allegation raised in PG&E/TURN's application and are of the opinion that good cause for granting rehearing has not been demonstrated. PG&E/TURN's allegations are based on their misinterpretation of the language in Public Utilities Code section 1731(c), which provides:

> "No cause of action arising out of any order or decision of the commission construing, applying, or implementing the provisions of Chapter 4 of the Statutes of the 2001-02 First Extraordinary Session shall accrue in any court to any corporation or person unless the corporation or person has filed an application to the commission for a rehearing within 10 days after the date of issuance of the order or decision. The commission shall issue its decision and order on rehearing within 20 days after the filing of that application."[2]

D.04-12-014 was issued on December 9, 2004, and SDG&E filed a timely application for rehearing on December 20, 2004.[3] We disposed of SDG&E's rehearing application in D.05-01-036 during our meeting of January 13, 2005.[4] In their rehearing

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[1] PG&E/TURN's rehearing application has no effect on DWR's ability to collect its revenue requirement from the utilities. Pending determination of the above-market costs in the limited rehearing, the forecasted above-market costs adopted in D.04-12-014 would be used, subject to adjustment.

[2] In D.04-12-014, we specifically noted the applicability of section 1731(c) to any challenges to D.04-12-014. (See, D.04-12-014, pp. 16 & 21 [Ordering Paragraph No. 10].)

[3] Pursuant to section 1731(c), the 10-day deadline to file an application for rehearing of D.04-12-014 was Sunday, December 19, 2004. As provided by Rule 3.2 of the Commission's Rules of Practice and Procedure, SDG&E filed on Monday, December 20, 2004, the first business day thereafter. (Code of Regs, tit. 20, §3.2.)

[4] The decision was issued on January 14, 2005.

application, PG&E/TURN assert that once the 20-day timeframe specified in section 1731(c) had passed, which would have been January 9, 2005, we no longer had jurisdiction to issue a decision disposing of SDG&E's rehearing application. Therefore, they contend that D.05-01-036 is unlawful.

PG&E/TURN's arguments are based on their belief that the phrase "shall issue" in section 1731(c) is mandatory and jurisdictional. They are incorrect. "Shall issue" in section 1731(c) is mandatory with respect to our *obligation* to issue a decision. However, it is directory, not mandatory, with respect to our jurisdiction.[5] "When the Legislature has specified a time within which an administrative board is to render a decision, that time limit may be mandatory in the obligatory sense, but this 'does not necessarily mean that a failure to comply with its provisions causes a loss of jurisdiction.' (Citation omitted.)" (*California Correctional Peace Officers Assn. v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1147.) "Time limits are usually deemed to be directory unless the Legislature clearly expresses a contrary intent." (*Edwards v. Steele* (1979) 25 Cal.3d 406, 410.) In this instance, section 1731(c) does not mandate that we shall lose jurisdiction, nor does it provide for what happens if we do not meet the 20-day timeframe.[6] As such, the phrase "shall issue" must be considered "directory" and we retained jurisdiction to issue a decision on SDG&E's rehearing even after the 20-day timeframe specified in section 1731(c) had passed.

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[5] Whether a statute is "directory" or "mandatory" with respect to jurisdiction refers to "whether the failure to comply with a particular procedural step will or will not have the effect of invalidating the governmental action to which the procedural requirement relates. (Citations omitted.)" (*Morris v. County of Marin* (1977) 18 Cal.3d 901, 908.)

[6] In contrast, the first sentence of section 1731(c) specifically provides that parties may not seek judicial review of a decision "construing, applying, or implementing the provisions of Chapter 4 of the Statutes of the 2001-02 First Extraordinary Session" unless an application for rehearing is filed within 10 days after the decision is issued.

Where a statute is directory, the proper remedy for failing to meet the statutory deadline is to file a writ of mandate compelling the administrative agency to act. (See *California Correctional Peace Officers Assn. v. State Personnel Bd.*, *supra*, 10 Cal.4th at p. 1146.) Parties were notified that we would be disposing of any rehearing applications of D.04-12-014 at our January 13, 2005 meeting.[7] (See *Administrative Law Judge's (ALJ) Ruling Regarding Applications for Rehearing of D.04-12-014*, mailed December 9, 2004, p. 2.) Thus, if any party had wanted us to act by the statutory deadline, they could have filed a writ requesting that we issue our decision no later than January 9, 2005. PG&E/TURN did not make such a writ petition. Rather, they elected to wait so that they could use our "untimeliness" as a basis for challenging a decision they did not like.[8]

Not only is there no statutory or other basis for PG&E/TURN's claim, but also such an interpretation would be contrary to Legislative intent. Section 1768 permits a party to file a petition for writ of review challenging a Commission decision "[w]ithin 30 days after the commission issues its order or decision denying the application for a rehearing." (Pub. Util. Code, §1768, subd. (a).) However, if the Commission were to lose jurisdiction to issue a rehearing decision after the statutory timeframe in section 1731(c) had passed, SDG&E would be unable to seek timely judicial review of

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[7] After our December 16, 2004 meeting, the next scheduled meeting was not until January 13, 2005.

[8] PG&E/TURN state in their rehearing application that they had not "agreed to any waiver of the statutory deadline." (PG&E/TURN's Application, p. 2, fn. 2.) This argument is without merit. This is not an issue of waiving jurisdiction, as we had continuing jurisdiction to issue a decision on rehearing after the 20-day timeframe had passed. To the extent PG&E/TURN's waiver argument concerns their ability to raise a challenge of our timeliness in their rehearing application, there is also no merit. As discussed, parties were explicitly informed that we would act on SDG&E's rehearing application at our January 13, 2005 meeting. PG&E/TURN failed to raise a timely objection challenging this fact, and thus, have missed their opportunity to raise this issue.

D.04-12-014.[9] It is unlikely that the Legislature would have intended such a consequence to occur. (See *California Correctional Peace Officers Assn. v. State Personnel Bd.*, *supra*, 10 Cal.4th at p. 1147.)

For these reasons, we find no grounds for granting rehearing, and thus, the application for rehearing shall be denied.

THEREFORE, IT IS ORDERED that rehearing of D.05-01-036 is denied.

This order is effective today.

Dated February 10, 2005, at San Francisco, California.

MICHAEL R. PEEVEY
President
GEOFFREY F. BROWN
SUSAN P. KENNEDY
Commissioners

Comr. Grueneich recused herself
From this agenda item and was not
part of the quorum in its consideration

[9] Section 1733(b) permits a party to seek judicial review of "any application for a rehearing" if the Commission has not acted on the application within 60 days after it has been filed. Thus, if the Commission were to lose jurisdiction once the 20-day timeframe had passed, an applicant would be unable to seek any relief from the courts until the 60 days had passed. PG&E/TURN have suggested that section 1733(b) does not apply to rehearing applications filed under section 1731(c). (PG&E/TURN's Application, p. 2.) We disagree. The consequences of such an interpretation would mean that an applicant would be deprived of any ability to seek judicial review. Clearly, the Legislature would not have intended such a harsh consequence.